

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COALVIEW CENTRALIA, LLC,
a Delaware limited liability company,

Plaintiff,

V.

TRANSALTA CENTRALIA MINING LLC,
a Washington limited liability company, and
TRANSALTA CORPORATION, a Canadian
corporation,

Defendants.

NO. 3:18-cv-05639

PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS
OUTSTANDING IN RESPONSE TO
PLAINTIFF'S REQUEST FOR
PRODUCTION

NOTE ON MOTION CALENDAR:

JULY 12, 2019

Plaintiff, COALVIEW CENTRALIA, LLC (“Coalview”), through undersigned counsel, and pursuant to Fed. R. Civ. P. 37(a)(3)(iv) and L.R. 37.1, hereby files this Motion to Compel Production Of Documents Outstanding In Response To Plaintiff’s Request For Production regarding the production of documents responsive to Coalview’s First Request for Production (the “**RFP**”) by Defendants, TRANSALTA CENTRALIA MINING LLC (“**TCM**”) and TRANSALTA CORPORATION (“**TCM Parent**”) (collectively, the “**Defendants**”), and in support, states:

INTRODUCTION

Coalview served its RFP *last year*, in December 2018. To date, TCM - by its own admission - has produced only a tiny fraction of the responsive documents it claims it has gathered in response to Coalview's RFP. Indeed, TCM's delay has proved to be a pattern. Because of TCM's initial failure to timely produce *any* documents in response to the RFP, Coalview was forced to file a motion to compel (the "**Initial Motion to Compel**") in February 2019 (D.E. 83). At that time, TCM had not produced a single document in response to Coalview's RFP. Despite over four months passing since Coalview filed its Initial Motion to Compel (which was denied by the Special Master based on TCM's representation to the Court that it would complete its production by April 5, 2019), TCM is far from completing its production (and in fact has only produced a small portion of promised documents), without having offered any valid justification. In fact, TCM has time and time again promised that production would be completed by a long-since-passed date certain, but has consistently retreated from, and rebuffed, each and every promised production schedule.

Now again, TCM has given no indication when it will complete production other than provide vague assertions. There must be an end to TCM's stalling and misrepresentations about the timing of its production. TCM's continued delay prejudices Coalview, preventing it from taking depositions and from otherwise prosecuting this action. TCM's obstructionist conduct has left Coalview with no reasonable alternative but to file this Motion. TCM should be compelled to complete production of all responsive documents forthwith or suffer meaningful sanctions for its failure to do so.

ARGUMENT AND AUTHORITIES

A. History of TCM's Delay in Producing Documents

1. Coalview served its RFP approximately six months ago in December 2018. See Declaration of Steve Silverman In Support of Plaintiff's Initial Motion to Compel (D.E. 94) (the “**Initial Silverman Declaration**”), ¶ 5.

2. On January 22, 2019, Defendants served their Responses and Objections to the RFP. *See* Initial Silverman Declaration, ¶6.

3. Defendants did not seek an extension of time to respond to the RFP or to provide responsive documents. *See* Initial Silverman Declaration, ¶7.

4. On January 22, 2019, Defendants' counsel sent a letter to Coalview's counsel stating that they "will be producing documents" and that "collection and production [of documents was] currently underway." (emphasis added). *See* Initial Silverman Declaration, ¶8.

5. But TCM had not produced any documents.

6. Thus, on February 6, 2019, the parties' respective counsel participated in a meet and confer conference. *See* Initial Silverman Declaration, ¶10.

7. During the meet and confer conference, TCM's counsel represented that they anticipated that TCM would produce the first set of documents by the end of the following week (i.e. the week of February 11), produce all emails by the end of the February, and the rest of production by March 8, 2019. *See* Initial Silverman Declaration, ¶13.

8. TCM did not produce any documents in accord with the schedule it represented it would adhere to, as referenced in the immediately preceding paragraph. *See* Initial Silverman Declaration, ¶14.

1 9. In fact, TCM did not produce *any* documents in response to the RFP until March
 2 22, 2019 (and this was only after Coalview filed its Initial Motion to Compel). *See* Declaration
 3 of Steve Silverman (“**Subsequent Silverman Declaration**”) filed contemporaneously
 4 herewith, ¶6.

5 10. In TCM’s Reply in Support of its Motion for Leave to Amend Counterclaim
 6 (D.E. 121), filed on April 26, 2019, TCM states:

7 TransAlta has gathered over **730,000 documents** from multiple sources . . .
 8 TransAlta has produced approximately 10,000 documents comprising 33,000
 9 pages and intends to produce more.

10 D.E. 121 at 4, n.3 (emphasis added).¹

11 11. On March 14, 2019 and March 26, 2019, the Special Master held telephonic
 12 conferences, including regarding Coalview’s Initial Motion to Compel, during which TCM’s
 13 counsel represented to the Court (and also confirmed by letter to Coalview) that TCM’s
 14 production would be completed by April 5, 2019. *See* D.E. 106 (Report and Recommendation)
 15 (“Defendant’s attorney indicated at the telephonic conferences held on March 14, 2019 and
 16 March 26, 2019 that Defendant continued to produce documents in response to the RFPs and
 17 expected to complete production in April 2019”) (emphasis added); *see also* Subsequent
 18 Silverman Declaration, ¶7 and Ex. A thereto.

19 12. Thus, based on the representation of TCM’s counsel that TCM would complete
 20 production by April 5, 2019, the Special Master recommended that Coalview’s Motion to
 21 Compel be denied. *See* D.E. 106 at 4.

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 25 1 While TCM has since produced some additional documents, the total number produced remains only a mere
 26 small percentage of the total number of documents TCM purports to have gathered. Moreover, TCM has given no
 indication when it anticipates completing its long-overdue production.

1 13. On April 4, 2019, shortly after the hearing where TCM’s counsel represented
 2 that TCM would complete production by April 5, and after the Special Master had issued its
 3 Report and Recommendation, TCM’s counsel sent an e-mail once again retreating from the
 4 production schedule that TCM represented, this time in open court to the Special Master only
 5 the week prior, claiming it was “no longer feasible” to produce by April 5, and claiming that
 6 TCM “do[es] expect to have the production substantially completed by the end of the month
 7 [April], however.” *See* Declaration of Steve Silverman In Support of Opposition to TCM’s
 8 Motion for Leave to Amend Complaint (D.E. 118-1) & Ex. 2 thereto.

9
 10 14. Since then, Coalview has repeatedly sought TCM’s production. On June 18,
 11 2019, counsel for the parties participated in a meet and confer conference, during which TCM’s
 12 counsel was unable give any indication when TCM anticipates completing its long-overdue
 13 production, other than providing vague assertions, such as that they “hope to be wrapping up.”
 14
 15 *See* Subsequent Silverman Declaration, ¶8.

16 **B. TCM Should Be Compelled to Complete Its Production Forthwith**

17 TCM has repeatedly delayed providing documents responsive to Coalview’s discovery
 18 requests *served last year* and that it promised to produce on many occasions, including
 19 providing that promise to the Court for no other purpose but to avoid an adverse ruling on
 20 Coalview’s Initial Motion to Compel. TCM’s repeated misrepresentations and failure to abide
 21 by its representations to counsel and to the Court have frustrated Coalview’s efforts to obtain
 22 documents, has caused unnecessary delay, and prevents Coalview from scheduling depositions
 23 and otherwise prosecuting this action. TCM’s continued delay required Coalview to file the
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1 Initial Motion to Compel back in February 2019, and has now necessitated the filing of this
 2 motion to compel.

3 Federal Rule of Civil Procedure 34 requires TCM to have produced documents long
 4 ago:

5 The production must then be completed no later than the time for inspection
 6 specified in the request or another reasonable time specified in the response. The
 7 production must then be completed no later than the time for inspection
specified in the request or another reasonable time specified in the response.

8 Fed. R. Civ. P. 34(b)(2)(B) (emphasis added). Undoubtedly, TCM is in violation of Rule 34.

9 Federal Rule of Civil Procedure 37 allows the Court to compel disclosure when a party has not
 10 provided discovery in a timely fashion. Fed. R. Civ. P. 37; *see also Melland v. Cornerstone*
 11 *Dental, PC, a Washington Corp.*, C13-5413 RJB, 2014 WL 12029282, at *2 (W.D. Wash. Jan.
 12 8, 2014) (granting motion to compel, finding that plaintiff “[wa]s entitled to the requested
 13 discovery forthwith” where based on defendants’ representations, discovery responses “should
 14 now have been served”); *Cunningham v. Bank One*, C05-2104RSM, 2006 WL 3361773, at *1
 15 (W.D. Wash. Nov. 20, 2006) (compelling production of documents by next day where party
 16 already agreed to produce information sought in response to discovery, but provided no
 17 explanation why such information had not yet been produced); *U.S. for Use & Benefit of Lord*
 18 *Elec. Co., Inc. v. Titan Pac. Const. Corp.*, 637 F. Supp. 1556, 1563 (W.D. Wash. 1986) (noting
 19 court had imposed sanctions, finding failure to deliver documents responsive to discovery in a
 20 timely manner was “totally inappropriate”).

21 Here, TCM has never disputed Coalview’s entitlement to the documents requested in
 22 December 2018 (indeed it has repeatedly promised to produce them), nor does TCM dispute
 23 that its production is incomplete. Nor does TCM dispute that it has the documents in its

1 possession and is obligated to produce them. Moreover, TCM cannot reasonably dispute that it
 2 has breached its representations of production on multiple occasions, and that its production has
 3 taken an excessive amount of time and has delayed Coalview's prosecution of this matter.
 4 There is no excuse for TCM's six month lapse in time since Coalview served its RFP during
 5 which TCM has failed to complete its production (nor is it apparently close to completion).
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7 Despite Coalview's numerous good faith efforts to resolve this dispute over the last six
 8 months, TCM remains unable to commit to any date by which the required production will be
 9 completed (and any date it has previously committed to, it has failed to meet). Coalview has
 10 exhausted its ability to let this matter proceed without TCM's production. Time is now of the
 11 essence, as the discovery deadline is rapidly approaching.² Unfortunately, it is abundantly clear
 12 that only an order of this Court will compel TCM to comply with its obligation to produce the
 13 documents it owes Coalview.
 14

15 Coalview should be awarded its reasonable fees pursuant to Rule 37 for its discovery
 16 misconduct and repeated breach of its promises to produce. Fed. R. Civ. P. 37(a)(5)(A); *see*
 17 also *Plascencia v. Collins Asset Group, LLC*, 17-1505MJP, 2019 WL 859222, at *3 (W.D.
 18 Wash. Feb. 22, 2019) (granting plaintiffs' request for fees pursuant to Rule 37 as defendant
 19 failed to timely produce documents it apparently already had in its possession); *Athwal v.*
 20 *Nijjer*, C17-00740RSL, 2018 WL 1156233, at *7 (W.D. Wash. Mar. 5, 2018) (granting
 21 reasonable fees for defendants' repeated failure to respect deadlines, finding three month delay
 22 in completing discovery to be unjustified). Indeed, the Notes of the Advisory Committee on
 23 Rule 37 provide that the Rule "places the burden on the disobedient party to avoid expenses by
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26 ² The parties recognize that the expert rebuttal disclosure deadline has passed under the Trial Order, and are
 27 working together in order to request by joint stipulation to reschedule that deadline, among others.

1 showing that his failure is justified or that special circumstances make an award of expenses
 2 unjust." *See* Fed. R. Civ. P. 37. Undoubtedly, TCM's document production is long overdue,
 3 what has been produced is incomplete, and TCM has no substantial justification for its conduct.
 4 By failing to produce documents, TCM has stalled and interfered with Coalview's investigation
 5 of the action, diverted attention from other important aspects of the action, and wasted
 6 Coalview's and the Court's time by necessitating this discovery dispute. While Coalview made
 7 multiple good-faith efforts to avoid having to file this discovery motion, unfortunately
 8 Defendants have demonstrated a pattern of being evasive and of stonewalling discovery.

10 WHEREFORE, for all the foregoing reasons, Coalview respectfully requests that the
 11 Court grant this motion to compel, require Defendants to produce all responsive documents
 12 forthwith, grant Coalview its reasonable attorneys' fees and expenses, and grant such other and
 13 further relief as this Court deems just and appropriate.

15 DATED this 27th day of June 2019.

16 KLUGER, KAPLAN, SILVERMAN,
 17 KATZEN & LEVINE, P.L.

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14 **CERTIFICATE OF CONFERRAL**

15 I hereby certify that, pursuant to Fed. R. Civ. P. 37 and L.R. 37, the movant has in good
16 faith conferred with counsel for the Defendants failing to make disclosure or discovery in an
17 effort to resolve the dispute without court action. While the parties have met and conferred on
18 this issue on several occasions, most recently, on June 18, 2019, counsel for Coalview, Steve I.
19 Silverman, Esq. and Jeremy R. Kreines, Esq. met and conferred via telephone with counsel for
20 Defendants, Duncan Manville, Esq. and Sarah Gohmann Bigelow, Esq. Respective counsel
21 have also exchanged various emails and letters.

22 s/*Steve I. Silverman*

23 Steve I. Silverman

24 **CERTIFICATE OF SERVICE**

25 I hereby certify that on June 27, 2019, I electronically filed the foregoing motion with
26 the Clerk of the Court using the CM/ECF system which will send notification of this filing to
all parties registered to receive such notice.

27 s/*Steve I. Silverman*

28 Steve I. Silverman